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IN THE
COURT OF APPEALS OF INDIANA

ERIS M. PRESLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0105-CR-00160
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Tornatta, Judge
Cause No. 82D02-0006-CF-507

November 21, 2001

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Eris Presley was found guilty by a jury of aggravated battery, a Class B felony. The

trial court sentenced Presley to the Indiana Department of Correction for fourteen years. He now appeals his conviction. We affirm.

Issues[1]

Presley raises the following restated issues for our review:

1. Whether the trial court committed fundamental error by instructing the jury that aggravated battery was a lesser-included offense of attempted murder;

2. Whether there was sufficient evidence to support his conviction for aggravated battery, a Class B felony; and

3. Whether he received the ineffective assistance of trial counsel at the sentencing hearing.

Facts and Procedural History

The facts reveal that on May 27, 2000, Presley shot Cedric Gibson in the face with a handgun.[2] Gibson survived his injuries. Consequently, the State charged Presley with attempted murder, a Class A felony. The trial court tendered an aggravated battery instruction to the jury. Thereafter, the jury found Presley of aggravated battery, a Class B felony. The trial court sentenced Presley to the Indiana Department of Correction for fourteen years. This appeal ensued.

Discussion and Decision

I. Fundamental Error in Jury Instructions

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[1] We note that oral argument was held at Indiana State University on November 7, 2001. We would like to thank Professor Linda Maule and her students for the warm hospitality bestowed upon us. In addition, we commend counsel for their advocacy.

[2] It is apparent from the record that the bullet entered Gibson's right cheek, exited by his ear, and then entered his right shoulder.

Presley first contends that the trial court committed fundamental error by instructing the jury that aggravated battery was a lesser-included offense of attempted murder. We disagree.

It is clear from the record, and there is no dispute, that Presley did not object to the lesser-included instructions of aggravated battery at trial. Ordinarily, a failure to object to a jury instruction results in a waiver of the issue. Brown v. State, 691 N.E.2d 438, 444 (Ind. 1998). However, an error may be fundamental and thus not subject to waiver, if it is a "substantial blatant violation of basic principles." Id. (quoting Winegeart v. State, 665 N.E.2d 893, 896 (Ind. 1996)). Fundamental error is error that, if not corrected, would deny a defendant fundamental due process. Id. The error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Id.

We do not believe that the doctrine of fundamental error applies in the present case. In Miller v. State, 753 N.E.2d 1284 (Ind. 2001), Dylon Miller was charged with three counts of attempted murder, three counts of resisting law enforcement, two counts of robbery, four counts of criminal confinement, and auto theft. Following a bench trial, the trial court found Miller guilty of all the charged offenses except for the attempted murder charges. Id. at 1286. Instead, the trial court found Miller guilty of three counts of criminal recklessness as factually lesser-included offenses of attempted murder.[3] Id. The Indiana Supreme Court affirmed the trial court's judgment as to Miller's three convictions of criminal recklessness.

[3] Miller appealed to this court, arguing in part that criminal recklessness was not a lesser-included offense of the attempted murder charges. Miller v. State, 726 N.E.2d 349 (Ind. Ct. App. 2000). We reversed

Miller v. State, 753 N.E.2d 1284, 1288 (Ind. 2001).

The Indiana Supreme Court first noted that Miller failed to provide a transcript of the hearing in which the trial court had found him guilty on three counts of criminal recklessness instead of three counts of attempted murder. Id. at 1287. The Court stated that without the transcript, it was impossible to determine whether: (1) the trial court sua sponte found Miller guilty of criminal recklessness and Miller failed to object; or (2) the prosecutor amended the information reducing the charges and Miller failed to object; or (3) Miller requested that criminal recklessness be considered in lieu of attempted murder. Id.

With regards to the third scenario, the Court stated that the doctrine of invited error precluded Miller from claiming reversible error on appeal. Id. As to the first and second scenarios, our supreme court stated that Miller failed to preserve the issue for appellate review. Id. Moreover, the Court rejected the argument that the doctrine of fundamental error applied. "Even if the trial court was incorrect in ruling criminal recklessness as a lesser-included offense of attempted murder, there is no fundamental error in finding [Miller] guilty of criminal recklessness."[4] Id. (footnote omitted) (citing Wright v. State, 658 N.E.2d 563, 567-68 (Ind. 1995)). In order to explain its holding, the Court analyzed a familiar claim in order to explain its determination that Miller was not entitled to relief:

> Occasionally, a prosecutor will seek permission to conform charges to the evidence presented during trial such that a jury is given the opportunity to

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by a 2-1 split vote, holding that the trial court erred when it found Miller guilty of criminal recklessness as factually included offenses of the attempted murder charges. Id. at 353.

[4] The Indiana Supreme Court stated that the fundamental error doctrine especially did not apply to Miller's appeal because he did not raise the issue of sufficiency of the evidence with regard to his convictions for criminal recklessness. Miller v. State, 753 N.E.2d 184, 1288 (Ind. 2001).

> convict on a lesser-included offense as opposed to those originally charged. If the amended charges are *not* lesser included of those originally charged, the defendant is entitled to object to the request, and if overruled, seek a continuance to prepare his case in light of the amendments. But if the defendant remains silent and the jury convicts him on the amended charge, the defendant is not entitled to appellate relief. The present case is analogous. [Miller] stands convicted of offenses which arguably are not lesser included offenses, but he apparently did not object to the court's ruling or ask for a continuance to further prepare his case. Under such circumstances, [Miller] is not entitled to relief.

Id. at 1288 (citations omitted) (emphasis in original).

Based upon our supreme court's well-versed guidance in Miller, we decline to hold that the fundamental error doctrine permits this court to consider the merits of Presley's argument that the trial court erred in instructing the jury on the lesser-included offense of aggravated battery, as he admittedly did not object. Accordingly, Presley's jury instruction issue is waived for our review.

II. Sufficiency of the Evidence

Presley also contends that there was insufficient evidence to support his conviction for aggravated battery, a Class B felony. We disagree.

A. Standard of Review

When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995). We look to the evidence and the reasonable inferences therefrom that support the verdict. Id. The conviction will be affirmed if evidence of probative value exists from which a jury could find the defendant guilty beyond a reasonable doubt. Id.

B. Aggravated Battery

Our initial inquiry is to examine the aggravated battery statute, which provides that:

> A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:
>
> (1) serious permanent disfigurement;
>
> (2) protracted loss or impairment of the function of a bodily member or organ; or
>
> (3) the loss of a fetus;
>
> commits aggravated battery, a Class B felony.

Ind. Code § 35-42-2-1.5. We will now examine the trial court's instruction on aggravated battery, a Class B felony. The trial court's Final Instruction No. 9 provides that:

> Included in the crime of Attempted Murder, charged in this case, is Aggravated Battery, a Class B felony.
>
> Aggravated Battery is defined as follows:
>
> A person who intentionally inflicts injury on a person that creates a substantial risk of death commits aggravated battery, a Class B felony.
>
> To convict [Presley], the State must prove each of the following elements:
>
> [Presley]
>
> 1. on or about May 27, 2000, intentionally
> 2. inflicted injury on another person, to-wit: Cedric Gibson
> 3. which created a substantial risk of death.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find [Presley] not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find [Presley] guilty of Aggravated Battery, a Class B felony, an included offense of Murder.
>
> I.C. 35-42-2-1.5

Id. at 44.

It is clear from the record that the jury was unaware of subsections (1), (2), and (3) of Indiana Code section 35-42-2-1.5. Because neither Final Instruction No. 9 nor any other instruction mentions "serious permanent disfigurement," "protracted loss or impairment of the function of a bodily member or organ," or "loss of fetus," we may only examine whether

the evidence adduced at trial is sufficient to support a conviction of aggravated battery on the basis that Presley knowingly and intentionally inflicted injury on Gibson which "created a substantial risk of death."

In the present case, Gibson testified at trial that Presley shot in him in the face at close range with a handgun. Dr. Mark Brooks Logan, an ear, nose, and throat specialist, testified at trial that the bullet entered the right side of Gibson's face and exited just below his ear. Dr. Logan further testified that the bullet shattered several of Gibson's facial bones and collapsed his ear canal. In addition, Dr. Logan testified that the bullet completely destroyed a portion of Gibson's facial nerve that would have to be reconstructed.[5] Therefore, we hold that there was sufficient evidence to support Presley's conviction for aggravated battery, a Class B felony, for creating a substantial risk of death.

III. Ineffective Assistance of Trial Counsel

Presley contends that he received the ineffective assistance of trial counsel at his sentencing hearing. We disagree.

To prevail on a claim of ineffective assistance of counsel, Presley must show that his counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms, and that the lack of reasonable representation prejudiced him. Strickland v. Washington, 466 U.S. 668, 687 (1984). Presley must rebut the presumption

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[5] Dr. Logan testified that "[t]he facial nerve leaves the brain, travels through the inner ear, and then exits the face and comes out into branches that go to different parts of the face that allow for closure of the eye, movement of the face, as well as facial expression." R. 54. "The surgery that it would require to reconstruct this, as the nerve was completely blown away by the bullet, would require drilling away the

that trial counsel exercised reasonable judgment and rendered adequate assistance with strong and convincing evidence to the contrary. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998).

Even if Presley establishes that his trial counsel's performance fell below the objective standard of reasonableness, he still must show prejudice resulting therefrom. Rondon v. State, 711 N.E.2d 506, 518 (Ind. 1999). The concept of prejudice, as established in Strickland, has been further defined as whether "counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

Presley argues that he received the ineffective assistance of counsel at his sentencing hearing because his attorney, Emil Becker, was suspended from the practice of law on the date of the hearing, March 7, 2001. Because he was suspended, Presley argues that Becker's representation was per se ineffective and that he is not required to make a showing of prejudice resulting from Becker's representation of him during the hearing. The Indiana Supreme Court suspended Becker for four months beginning March 5, 2001, for violating Indiana Professional Conduct Rule 8.1(a)[6] in an unrelated matter. See In re Becker, 743 N.E.2d 1115 (Ind. 2001). However, the Indiana Supreme Court's docket reveals that notice of this suspension was not mailed to Becker until March 8, 2001. Therefore, the status of

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mastoid bone, finding the branches of the nerve in the face, taking a nerve from somewhere else in the body, either the neck or leg, and then under a microscope, rebuilding the nerve." R. 55.

[6] This professional conduct rule provides that:

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

Becker's law license did not render his representation of Presley at the sentencing hearing ineffective.

Accordingly, Presley's claim of ineffective assistance of trial counsel must fail.

Conclusion

Based on the foregoing, we hold that Presley waived our review of his claim that the trial court erred instructing the jury on the lesser-included offense of aggravated battery, a Class B felony. In addition, we hold that there was sufficient evidence to support Presley's conviction for aggravated battery, a Class B felony. We further hold that Presley did not receive the ineffective assistance of trial counsel at sentencing.

Affirmed.

BAKER, J., and FRIEDLANDER, J., concur.

> (a) knowingly make a false statement or material fact . . . .
>
> Prof. Cond. R. 8.1(a).